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IN THE

# Supreme Court of the United States

**October Term, 1961**

**No. 260**

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# INDEX


PAGE

Opinions Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

Statute Involved ..... 3

Statement of the Case ..... 4

A. The Facts ..... 4

B. The Trial Examiner's Findings and Conclusions ..... 5

C. The Board's Conclusion and Order ..... 7

D. The Decision of the Court Below ..... 8

Reasons for Granting the Writ ..... 9

1. The Issue Is of the Utmost Importance ..... 9

2. The Decision of the Court Below is in Conflict with Decisions of this Court ..... 11

3. There is Nothing Illegal in a Union Protecting the Standards of its Members by Advertising to the Public the Non-Union Status of a Particular Employer ..... 14

Conclusion ..... 16

Appendix A—Opinion of the court below, decided April 17, 1961 ..... 17

Appendix B—Order, May 4, 1961 ..... 27

## Table of Cases.


| | PAGE |
|---|---|
| American Steel Foundries v. Tri-Cities Central Trades Council, 257 U. S. 184, at 209 | 10 |
| Apex Hosiery Co. v. Leader, 310 U. S. 469 | 10 |
| Chauffeurs Union v. Newell, 356 U. S. 341 | 14 |
| Exchange Bakery v. Rickin, 245 N. Y. 260, at 263 | 10 |
| IBEW v. N. L. R. B., 341 U. S. 694, 701-3 | 13 |
| Local 761, International Union of Electrical, Radio & Machine Workers v. N. L. R. B., —— U. S. ——, 81 S. Ct. 1285, 1289 | 12 |
| Local 761 I. U. E. v. NLRB, 364 U. S. 869 | 9 |
| Mastro Plastics Corp. v. NLRB, 348 U. S. 910 | 9 |
| McLeod v. Local 239, D. C. E. D. N. Y. 179 F. Supp. 481 | 5 |
| N. L. R. B. v. Drivers Union Local 639 (Curtis Bros.), 362 U. S. 274 | 5, 11 |
| N. L. R. B. v. I. B. of T., 272 F. 2d 85, 89 (C. C. A. 2) | 12 |
| N. L. R. B. v. Insurance Agents, 361 U. S. 80 S. Ct. 419, 432 | 12 |
| NLRB v. International Rice Milling Co., 341 U. S. 665 | 11, 12 |
| Thornhill v. Alabama, 310 U. S. 88, 97-98 | 14 |
| United Rubber Workers v. N. L. R. B., 362 U. S. 274 | 11 |


## Statutes.


| | |
|---|---|
| Labor-Management Reporting and Disclosure Act of 1959 | 3 |
| Section 704(c), 73 Stat. 544 | 3 |
| National Labor Relations Act | 11 |
| Section 8(b)(7)(C) | 2, 3, 5, 6, 7, 9 |
| Section 8(b)(7) | 2, 3, 4, 5, 6, 9, 12, 13, 14 |

PAGE

Section 10(1) ..... 5
Section 8(b)(1)(A) ..... 5
Section 8(b)(1) ..... 6, 13
Section 7 ..... 10
Section 13 ..... 11
Section 8(b)(4) ..... 13
Section 8(b) ..... 13
United States Constitution, First Amendment .... 3, 9, 14
28 U. S. C. § 1254(1) ..... 2
29 U. S. C. 158 (b) (7) ..... 3

MISCELLANEOUS.

A Preliminary Look at Section 8(b)(7), Bernard Duvan, 48 The Georgetown Law Journal 371, 376, Winter 1959 ..... 9
Solicitor General Archibald Cox in a monograph entitled "Law and the National Labor Policy" ..... 14
Van Arkel, "Picketing under the 1959 Amendments", 13 N. Y. U. Annual Conference on Labor 201, 207 .. 14

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Local 239, International Brotherhood of Teamsters, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on May 4, 1961, enforcing an unfair labor practice order issued by the National Labor Relations Board.

### Opinions Below

The opinion of the court below (Appendix A, *infra*, pp. 17-26) is reported at 289 F. 2d 41. The findings of fact, conclusions of law and order of the National Labor

Relations Board (J. A. 8-18*) are reported at 127 N. L. R. B. No. 132.

## Jurisdiction

A judgment of the Court of Appeals was entered on the petition for enforcement of an order of the National Labor Relations Board on May 4, 1961 (Appendix B, *infra*, pp. 27-28). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## Questions Presented

1. Whether it is an unfair labor practice under Section 8(b)(7)(C) of the Act for a Union to engage in peaceful picketing for 13 days (or 17 calendar days until November 30) after the effective date of the Act without filing a petition for an election?

2. Under Section 8(b)(7)(C) of the Act providing for picketing for a reasonable period of time not to exceed 30 days, can the 30 day period be reduced because of lawful picketing conducted prior to the effective date of the Section 8(b)(7)?

3. Does orderly and peaceful picketing of the primary employer result in "forcing or requiring" recognition?

4. Should all picketing be enjoined if one of the objects is to truthfully advertise to the public that the employer does not have a contract with a labor organization?

5. (a) Under the Second Proviso of Section 8(b)(7)(C) of the Act, does picketing, otherwise lawful, become unlawful, if anyone pays sufficient attention to refuse to cross the picket line?

* The reference "J. A." designates the portion of the record printed as a Joint Appendix to the briefs in the Court of Appeals.

(b) Does the Second Proviso to Section 8(b)(7)(C) of the Act under all circumstances preserve the right to picket in order to advise the public that an employer is nonunion?

(c) If the answer is "NO", is Section 8(b)(7)(C) unconstitutional under the First Amendment to the U. S. Constitution as a restraint against peaceful picketing which has no unlawful purpose?

(d) Can the protection of the Second Proviso be lost if the picketing Union does not actually intend to affect deliveries but deliveries are nevertheless affected because persons refuse to make deliveries by reason of the mere presence of the picket line?

6. Does the Second Proviso preserve labor's traditional means of communication (*i.e.* picketing, the purpose of which is to advise the public of the nonunion status of the employer) despite the existence of a proscribed object?

## Statute Involved

This case involves one of the provisions of the Labor-Managment Reporting and Disclosure Act of 1959. Section 704(c) of the Act, 73 Stat. 544, added a new Union unfair labor practice. Section 8(b)(7), 29 U. S. C. 158 (b) (7), the clause creating the new unfair labor practice, provides, in the part here pertinent, that it shall be an unfair labor practice for a labor organization of its agents

> "(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is cur-

rently certified as the representative of such employees.
• • •

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this sub-paragraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

## Statement of the Case

### A. The Facts

On September 21, 1959 Petitioner (herein called "the Union") began to picket Stan-Jay Auto Parts & Accessories Corp. (herein called "Stan-Jay") in an attempt to organize Stan-Jay's employees (J. A. 18-19). These employees had never been represented by any labor organization (J. A. 22). The picketing was "orderly and peaceful" (J. A. 27). On November 13, 1959, Section 8(b)(7) became effective. On November 23, 1959 Stan-Jay filed an unfair labor practice charge under Section 8(b)(7), which was mailed by the Board's regional office to the Union on November 25 and received by it on Thanksgiving Day, November 26 (J. A. 29, footnote 6).

On November 25, the Board's Regional Director telegraphed the Union notifying it that unless a petition for an election was filed no later than Friday November 27, a complaint would issue under Section 8(b)(7) (J. A. 58). November 26 was a legal holiday—Than' sgiving Day—the Board's offices were closed for business. The Union was thus notified that unless it filed a petition on the very day it was given notice of the filing of unfair labor practice charges, the Board's Regional Director would issue a complaint under Section 8(b)(7).

No petition having been filed by the Union, on November 30, the complaint issued and on December 2 the Regional Director applied for a Section 10(1) injunction which subsequently was issued. *McLeod v. Local 239*, D. C. E. D. N. Y. 179 F. Supp. 481.

Since November 24, the Union picket signs were in the language of the Proviso in Section 8(b)(7)(C)—of an informational nature advertising Stan-Jay's nonunion status (J. A. 29). The new signs read: "To the public. Please be advised Stan-Jay * * * does not employ members of, nor has a contract with any labor union * * *" (J. A. 28).

In addition to the 8(b)(7) complaint, another complaint issued on November 19th charging a violation of Section 8(b)(1)(A) by reason of the picketing which started on September 21 (J. A. 18-19).

### B. The Trial Examiner's Findings and Conclusions

The Trial Examiner found the picketing was orderly and peaceful (J. A. 27). He found that the picketing since September 21, 1959 violated Section 8(b)(1)(A) (J. A. 37). [However, when the case reac[illegible] the Board this court had decided *N. L. R. B. v. Drivers Union Local 639*

*(Curtis Bros.)*, 362 U. S. 274 holding that peaceful minority picketing was not violative of Section 8(b)(1). The Board dismissed the 8(b)(1) complaint (J. A. 9, footnote 1)].

The Trial Examiner found that about 90 per cent of the employees engaged in Stan-Jay's line of business had collective bargaining contracts with the union; that the union holds to the philosophy that unorganized employers in the industry are in a position, because of their inferior employment standards, to compete unfairly with employers who are under contract with the Union; that non-union employers thus represent a threat, not only to the economic security of their organized competitors, but derivatively to the preservation of the labor standards enjoyed by the employees in the organized segment of the industry (J. A. 22).

The Trial Examiner found that 17 days of peaceful picketing from November 13—the effective date of section 8(b)(7)—until November 30, constituted more than a reasonable period of time within the intendment of Section 8(b)(7)(C), because of the pre 8(b)(7) picketing which started on September 21 (J. A. 42).

Prior to November 13, 1959, Stan-Jay adopted the practice and procedure of sending its own trucks to its suppliers to pick up merchandise (J. A. 31). Since October in ordering merchandise, it had not asked suppliers to make deliveries to its premises (J. A. 96). Two drivers refused to cross the picket line as a matter of personal principle. The third did not make the delivery because his boss (Quality Brakes) told him not to cross the line (J. A. 32, footnote 10). The third driver testified as a Board's witness that although he was a member of the picketing Un-

ion, the Union told him it "couldn't stop me from going in", but it was up to him whether he went in or not—a matter of personal principle (J. A. 171-172). There was a back delivery entrance that was not being picketed (J. A. 149).

One of the Board's witnesses testified that his driver "didn't refuse to make" deliveries. In fact, although the driver went into the store to pick up merchandise, the reason he didn't pick up was "that there was nothing ready for him" (J. A. 113-114).

Another Board witness testified that as a good union man he would not cross the picket line. No one from the Union spoke to him (J. A. 165). A Railway Express employee testified that he personally does not cross picket lines (J. A. 167-168).

In fact, one supplier would not sell the Company unless it picked the merchandise up itself at the seller's premises (J. A. 94-95).

The Trial Examiner commented that truckdrivers who are members of the Teamsters are reluctant to cross a picket line; that the picketing had the actual effect of interfering with deliveries; that the intended effect as shown by the above facts, was immaterial (J. A. 48-49).

The Trial Examiner found a violation of the Act and said the Union lost the benefit of peaceful informational picketing under the second proviso.

### C. The Board's Conclusion and Order

Respondent Board found that the Petitioner violated Section 8(b)(7)(C) of the Act. The Board ordered that Petitioner cease and desist from all picketing (J. A. 8-17). It found that:

> "The picketing for organization and recognition had been going on continuously for almost 2 months before the new Act became effective. In the light of this background, we agree with the Trial Examiner that the 17 days of additional picketing thereafter was a reasonable period of time in which to require the Respondent to file a representation petition or face enjoinment of the picketing."

The Board's Order, as enforced by the Court of Appeals, requires the Union to cease and desist from all picketing.

### D. The Decision of the Court Below

The court below granted enforcement of the Board's order. In the court's view, this case raised only a substantial evidence question, and the court rejected Petitioner's contention that a critical question of statutory interpretation was involved. The court concluded that there was substantial evidence to support the conclusion that a reasonable period of time in which the Union could campaign for support before filing for a representation election had expired thirteen (13) days after the effective date of the Act, in the light of lawful peaceful picketing by the Union for a substantial period of time prior to the effective date of the Act. The court concluded that "in the light of the pre-November 13 picketing, we cannot find erroneous the Board's determination that a reasonable period of time * * * had expired by November 30."

The court rejected Petitioner's contention that its peaceful picketing constituted lawful traditional primary activity and that a " 'reasonable period of time not to exceed thirty days' must be read to mean 'thirty days' in the absence of 'unusual compelling and extenuating circumstances' ".

The court below mistakenly construed the Act to prevent the peaceful picketing by petitioner and Section 8(b)(7)(C) as so construed, infringes the First Amendment of the Constitution of the United States.

## Reasons for Granting the Writ

### 1. The Issue Is of the Utmost Importance.

The incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification, *Local 761 I. U. E. v. NLRB*, 364 U. S. 869. The question whether Section 8(b)(7)(C) of the Act interdicts peaceful picketing in less than thirty (30) days is of major importance, not only in the administration of the Act, but also in the conduct of labor-management relations generally, *Mastro Plastics Corp. v. NLRB*, 348 U. S. 910. Unions frequently utilize this economic weapon to further their goals, and a decision as to its propriety would obviously have a significant bearing on the balance of power in labor disputes affecting commerce. The Board has been, on a case by case basis, determining what period less than 30 days is reasonable. "To leave the determination of a reasonable period to *ad hoc* adjudication after the event is to require that important rights be exercised at the risk of being condemned as illegal without any knowable standard by which to judge in advance where the line between the licit and the illicit is drawn." (A Preliminary Look at Section 8(b)(7), Bernard Duvan, 48 The Georgetown Law Journal 371, 376, Winter 1959).

In these circumstances a resolution of the question by this court is clearly appropriate.

This case presents the important constitutional question of whether Section 8(b)(7) was intended by Congress, or

can be used as a device by the Board, to outlaw peaceful and orderly primary picketing. The type of picketing herein challenged is commonly known as "organization" or "recognition" picketing, and consists of peaceful picketing of a primary employer by a labor organization for the purpose of obtaining organization and recognition as bargaining representative.

This case necessarily raises the question, to what extent did Congress seek to outlaw peaceful picketing for recognition and to what extent should labor unions be permitted constitutionally to use peaceful picketing as a technique for organizing employees and advertising the non-union status of an employer.

Section 7 of the Act includes in the rights therein mentioned, the right of Union employees to seek, by picketing and other peaceful means, to extend organization and collective bargaining relationships throughout an entire trade or industry as a means of establishing competitive wage rates and working conditions within such areas, and this right has long been recognized by the courts.

*American Steel Foundries v. Tri-Cities Central Trades Council*, 257 U. S. 184, at 209; *Apex Hosiery Co. v. Leader*, 310 U. S. 469. This court noted in *Apex Hosiery Co., supra*, at 503 that the elimination of competition from non-union made goods was a legitimate labor objective. Section 7 of the Act indeed recognizes that principle in its guarantee that "employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Exchange Bakery v. Rickin*, 245 N. Y. 260; at 263.

Congress, in Section 7 of the Act, gave broad protection to the right of picketing for the purpose of mutual aid

and protection, including the right to picket for recognition, but it did not stop there. Perhaps fearful of administrative attempts to nullify such right through a process of interpretation, it enacted Section 13, under which it made clear that "all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the Union's traditional right to strike, may be so read only if such interference, impediment or diminution is specifically provided for in the Act' ". (*NLRB v. International Rice Milling Co.*, 341 U. S. 665.)

An issue of grave importance in the administration of the National Labor Relations Act and affecting the customary functioning of labor organizations under such Act is involved under the instant petition for certiorari.

**2. The Decision of the Court Below is in Conflict with Decisions of this Court.**

The decision below fails to follow the applicable principles of law enunciated by the court in *N. L. R. B. v. Drivers Local Union*, 362 U. S. 274 and in *United Rubber Workers v. N. L. R. B.*, 362 U. S. 274, wherein it was held that peaceful recognition picketing does not amount to "restraint or coercion" under the Act.

In *N. L. R. B. v. Drivers Local Union, supra*, this court held that "restrain or coerce" did not encompass peaceful minority picketing to obtain recognition, and in so doing, expressed the view that such language was a grant of power to the Labor Board limited to authority to proceed against Union tactics involving more than the general pressures upon persons employed by the affected employers implicit in peaceful picketing.

"Congress has been rather specific when it has come to outlaw particular economic weapons on the part of

unions." *N. L. R. B. v. Insurance Agents*, 361 U. S. 80 S. Ct. 419, 432. By Section 8 (b) (7) Congress did not desire to regulate all recognition or organizational picketing. It merely regulated that kind of picketing which has as an object "forcing or requiring" recognition. All picketing has in it elements of coercion and restraint; yet if Congress had intended to prohibit all organizational and recognitional picketing, it would unquestionably have done so directly rather than indirectly as "forcing or requiring". See *N. L. R. B. v. I. B. of T.*, 272 F. 2d 85, 89 (C. C. A. 2).

In *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665, 672-673, this court ruled that inducements to respect a primary picket line do not result in "forcing or requiring" an employer for the proscribed object or recognizing or bargaining with the picketing union as the representative of its employees.

But not all so-called recognitional or organizational picketing was outlawed in Section 8(b)(7). Concededly, picketing has in it elements of persuasion and influencing others at least through the solicitation of the support of public opinion. Yet, if Congress had intended to prohibit all organizational and recognitional picketing, it unquestionably would have done so directly rather than indirectly as "forcing or requiring".

Recently, this court in *Local 761, International Union of Electrical, Radio & Machine Workers v. N. L. R. B.*, ____ U. S. ____, 81 S. Ct. 1285, 1289, stated:

> "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises." *Id.*, at page 591. "Almost all picketing, even

> at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." Local 294, *supra*, 284 F. 2d at page 890. "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer. *National Labor Relations Board v. International Rice Milling Co., supra.*"

The Act contains three different types of situations. One, to "induce or encourage" (Sec. 8(b)(4)), another phrase "restrain or coerce" (Sec. 8(b)(1)), and a third phrase "forcing or requiring" (Sec. 8(b)(4)). Prior to the recent amendments to the Act, the phrase "forcing or requiring" were used only in secondary boycott situations under Section 8(b) of the Act. Picketing a secondary employer for the purpose of bringing pressure thereby on the primary employer has been held to be "forcing or requiring" because of the secondary boycott activities involved. Peaceful picketing directly of the primary employer is at best inducing or encouraging rather than "forcing or requiring".

In *IBEW v. N. L. R. B.*, 341 U. S. 694, 701-3, this court indicated that the phrase "induce or encourage" is broad enough to include every form of influence and persuasion and thereby includes peaceful picketing. If Congress intended in Section 8 (b) (7) to outlaw all peaceful picketing for recognition or organizational purposes, it could have clearly said so by stating that picketing which has as an object "inducing or encouraging" recognition or organizational purposes should be outlawed. Instead of doing this, it used the more restricted phrase "forcing or requiring". The phrase "forcing or requiring" when used in

connection with primary picketing must refer to the use of some illegal means. See *Van Arkel "Picketing under the 1959 Amendments"*, 13 N. Y. U. Annual Conference on Labor 201, 207. If the language "forcing or requiring" was intended to outlaw all peaceful picketing, then Section 8 (b) (7) constitutes a blanket prohibition upon peaceful primary picketing, and it would violate the first amendment to the United States Constitution. *Chauffeurs Union v. Newell*, 356 U. S. 341; *Thornhill v. Alabama*, 310 U. S. 88, 97-98. The mere fact that there is picketing does not automatically justify its restraint, *Thornhill v. Alabama, supra.* That *Thornhill* is not completely moribund is evidenced further by this Court's summary reversal, simultaneously with the granting of certiorari in *Newell, supra.*

**3. There is Nothing Illegal in a Union Protecting the Standards of its Members by Advertising to the Public the Non-Union Status of a Particular Employer.**

Solicitor General Archibald Cox in a monograph entitled "Law and the National Labor Policy" takes the position that despite the concern of the law with preserving to each employee the right to freedom of choice regarding Union representation, Unions may protect the standards of their members not alone by achieving majority designations but also, if they cannot organize the majority by driving the production of non-union labor off the market or driving the wages and working conditions of non-union employees up to the Union level, when this is essential to preserve Union standards. Thus, in commenting on Section 8 (b) (7) of the National Labor Relations Act, enacted subsequent to events here involved, the monograph states (at pages 27-28):

> "Banning organizational picketing after an N. L. R. B. election partially rejects the struggle for life, for it

prefers the nonunion employees' interest in self-determination over the union's interest in spreading its organization as a means of protecting its wage scale and labor standards. Suppose, however, that a union were to picket for the avowed purpose of publicizing the low wages paid in an establishment, without becoming the bargaining representative, in order to compel the owner to raise his wages to the union scale or else to prevent the distribution of the low-cost, nonunion goods in direct competition with the product of union labor. NLRA section 8 (b) (7) prohibits picketing only

> where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or * * * the employees of an employer to accept or select such labor organization as their collective bargaining representative * * *

"The very few men close to the drafting of the Conference Report who understood this problem had no common intention—perhaps 'had conflicting intentions' would be a better phrase. Presumably, the N. L. R. B. will follow the decisions under section 8(b)(4)(C) which hold that picketing in support of a demand which is customarily made in collective bargaining is picketing for recognition. I am inclined to think that the rule is wrong in principle, and it is opposed by judicial rulings distinguishing organizational picketing from picketing to protest competition of non-union goods. The prohibition seeks to protect the employees' decision concerning union representation, not their freedom to work at substandard wages without reprisal from those whom they injure. The union's objective of eliminating the competition based upon differences in labor standards can be accomplished without interfering with the employees' decision concerning union representation. There is some risk that this approach would encourage the kind of verbal evasions which I criticized earlier, but the danger can be eliminated by treating the union's objective as a question of fact which requires looking behind the ostensible purpose. Regardless of what the union may say, recognition is an objective of any picketing of an unorganized shop.

> but the force of this presumption, based upon experience, can be dissipated by proof that the labor conditions of which the union complains are presently such an immediate and substantial threat to existing union standards in other shops through the force of competition as to support a finding that the union has a genuine interest in compelling the improvement of labor conditions or eliminating the competition even though the union does not become the bargaining representative." (Footnotes omitted.)

We agree with Solicitor General Cox that there is nothing in the law which prevents a union from protecting the standards of its members by either eliminating the non-union labor or requiring that non-union labor receive union wages and conditions.

## Conclusion

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

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*Counsel for Petitioner.*

## Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 271—October Term, 1960.

(Argued February 24, 1961 Decided April 17, 1961.)
Docket No. 26600

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

—v.—

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Respondent.*

---

Before:

HINCKS and MOORE, *Circuit Judges,*
and BRENNAN, *District Judge.**

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The N. L. R. B. petitions for enforcement of its order finding that respondent union committed an unfair labor practice under Section 8(b)(7)(C) of the Taft-Hartley Act, as amended in 1959. *Enforcement granted.*

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* Sitting by designation.

*Appendix A*

JAMES C. PARAS, Atty., National Labor Relations Board, Washington, D. C. (Stuart Rothman, Gen. Counsel, Dominick L. Manoli, Asso. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Frederick U. Reel, Atty., N. L. R. B., Washington, D. C., on the brief), *for petitioner.*

CHARLES R. KATZ, New York City, *for respondent.*

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HINCKS, *Circuit Judge:*

This case involves one of the provisions of the Labor-Management Reporting and Disclosure Act of 1959. Section 704(c) of the Act, 73 Stat. 544, added a new union unfair labor practice to the National Labor Relations Act of 1935, § 8, 49 Stat. 449, as amended, Labor-Management Relations Act of 1947, 61 Stat. 141, 29 U. S. C. § 148. Section 8(b)(7), 29 U. S. C. A. § 158(b)(7), the clause creating the new unfair labor practice, provides, in the part here pertinent, that it shall be an unfair labor practice for a labor organization or its agents

> "to picket or cause to be picketed * * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, that when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."[1]

As found by the Trial Examiner, the facts are these. The employees of Stan-Jay Auto Parts & Accessories Corp., a corporation engaged in interstate commerce and within the N. L. R. B.'s jurisdictional limits, had never been represented by a labor organization. In September 1959, the respondent [hereinafter "the union"] began to picket Stan-Jay. There is no doubt that the union's pur-

[1] Subsections (A) and (B) are not involved in this case. They respectively prohibit picketing with an object of forcing or requiring recognition or organization (A) when the employer has lawfully recognized another labor organization and when a question concerning representation may not appropriately be raised under § 9(c), and (B) when a valid § 9(c) election has been held within the preceding 12 months.

pose at that time was to obtain recognition or organization. This picketing was "orderly and peaceful." The picket signs read, in pertinent part, "Local 239 * * * wants the employees of Stan-Jay [sometimes supplemented with the words "is stingy"] * * * to join them to gain union wages, job security and working conditions."

On November 13, 1959, section 8(b)(7) became effective. On November 23, Stan-Jay filed an unfair labor practice charge, which was mailed by the regional office of the Labor Board to the union on November 25, and received by it on Thanksgiving Day, November 26. On November 25, the Regional Director telegraphed the union requesting it to inform him whether it intended to file a representation petition and notifying it that unless a petition was filed by close of business Friday, November 27, a complaint would be issued and an injunction sought under § 10(L). No petition having been filed by the union, on November 30 the unfair labor practice complaint was issued. On December 2, the Regional Director applied for a 10(L) injunction which was issued on January 21, 1960. *McLeod v. Local 239, Int'l Brotherhood of Teamsters*, D. C. E. D. N. Y., 179 F. Supp. 481, 182 F. Supp. 949.

Sometime after November 24, the union changed its picket signs from the clearly recognition-organizational ones quoted above to signs following the language of the second proviso to § 8(b)(7)(C). The new signs read: "To the public. Please be advised Stan-Jay * * * does not employ members of, nor has a contract with any labor union including Local 239, I. B. of T."

On June 1, 1960, the Labor Board issued its Decision and Order, 127 N. L. R. B. No. 132, finding that the union

had committed an unfair labor practice and ordering it to cease and desist from picketing Stan-Jay "under conditions prohibited by 8(b)(7)." We have jurisdiction over this petition for enforcement, the alleged unfair labor practices have occurred in Long Beach, New York, within this circuit. Section 10(e), 29 U. S. C. A. § 160(e).

The union makes essentially three arguments designed to show that its activity was outside the ambit of § 8(b)(7)(C). It argues (1) that its activity was not covered by the preamble of § 8(b)(7) because, it claims, (a) recognition or organization was not an "object" of its post-November 13 picketing, and (b) even if an "object" of the picketing was recognition or organization, the picketing did not have an object of "forcing or requiring" recognition or organization; (2) that its activity was not covered by § 8(b)(7)(C) because it was not afforded a "reasonable time" to picket without petitioning for election under § 9(C); and (3) that its activity was exempted from § 8(b)(7)(C) by the second proviso thereto inasmuch as (a) it had the purpose of truthfully advising the public that Stan-Jay does not employ members of, or have a contract with, a labor organization, and (b) it did not have the effect of inducing any person not to pick up or deliver.

The union's argument that recognition or organization was not "an object" of its post-November 13 picketing is disposed of easily. The Examiner and the Board, in concluding that such "an object" existed after the effective date of § 8(b)(7), took into consideration the clearly recognition-organizational object of the union before November 13. This, urges the union, presumes the existence of an

illegal act. But a sign with a clearly recognition-organizational purpose continued to be used for at least eleven days after § 8(b)(7) took effect, indicating that the union's object, like its sign, had not changed, and on November 20, the union's business agent proposed a "deal" whereby the picketing would cease (and would begin at one of Stan-Jay's nonunion competitors) in consideration of two of Stan-Jay's three employees joining the union and in further consideration of a contract with a union-shop clause. It follows that the proscribed, recognition-organization, object (which, in any event, would not have been "illegal" had the union filed a representation petition within a reasonable time) was not presumed to have continued from before November 13, but was independently proved. Thus our decision in *N. L. R. B. v. Local 50, Bakery Workers*, 2 Cir., 245 F. 2d 542, is inapplicable. The pre-November 13 evidence, was, at most, circumstantial evidence which corroborated the post-November 13 evidence, or was used as a background against which to interpret the post-November 13 facts.

The union's argument that its object was not to "force or require" recognition or organization is premised on the notion that the statutory language contemplates physical violence or threats thereof. But the setting of the language makes it clear that "forcing or requiring" refers to the intended effect of the picketing, not the manner in which the picketing is carried on, to the "object," not the method, and it is clear that the union's object was swiftly to compel organization or recognition, not merely to create a climate in the shop favorable to the union. The phrase "forcing or requiring" was used in § 8(b)(4) before the passage of

the 1959 amendments, see 29 U. S. C. A. § 158(b)(4)(A), (B), (C), (D), and the case law thereunder does not require violence. See *e.g., N. L. R. B. v. Enterprise Ass'n of Steam, etc. Pipefitters, Local No. 638*, 2 Cir., 285 F. 2d 642, 645, where we found an entirely peaceful refusal to install pipe to have as its object "forcing or requiring any employer to cease using, * * * or otherwise dealing in the products of any other producer or to cease doing business with any other person" in violation of § 8(b)(4)(A). And see the discussion of the instant problem in Comment, 69 Yale L. J. 1393, 1398. The fact that picketing, which involves the use of speech, is the subject-matter of § 8(b)(7) does not change the meaning of "forcing or requiring." And the union's argument is no more persuasive when cast in constitutional language. *Cf. Greene v. International Typographical Union*, D. C. D. Conn., 182 F. Supp. 788, 792-93. It is true, of course, that *N. L. R. B. v. Drivers Local No. 639*, 362 U. S. 274, the *Curtis Bros.* case, held that peaceful recognition picketing does not amount to "restraint or coercion" of rights guaranteed by § 7, 29 U. S. C. A. § 157, which made it an unfair labor practice under § 8(b)(1)(A), and that the Supreme Court referred to "the sensitive area of peaceful picketing." And see *N. L. R. B. v. International Brotherhood of Teamsters, Local 182*, 2 Cir., 272 F. 2d 85. But this cannot be said to amount to a holding that peaceful picketing can constitutionally be said to have the object of "forcing or requiring" only if it involves violence. Indeed, *Curtis Bros.* itself, 362 U. S. at 291, notes that § 8(b)(7) "proscrib[es] * * * peaceful organization strikes in many situations."

Thus the Union's activity is within the preamble to § 8(b)(7) (quoted above), and the inquiry shifts to subsection (C). Organizational or recognition picketing by an uncertified Union is barred under that subsection if the Union fails to file a petition for an election "within a reasonable period of time not to exceed thirty days from the commencement of such picketing." The Union claims it was not given such a reasonable period of time after November 13. By its own count, however, it picketed for 13 days after the effective date of § 8(b)(7) without petitioning for an election. In the light of the pre-November 13 picketing, we cannot find erroneous the Board's determination that a reasonable period of time in which the Union could campaign for support had expired by November 30. The Union suggests that a "reasonable period of time not to exceed thirty days" must be read to mean "thirty days" in the absence of "unusual compelling and extenuating circumstances," lest it be in danger of being so vague as to violate due process or constitute an unconstitutional delegation to the Board of legislative power. The statute plainly contemplates thirty days as the outer limit, with power in the Board, subject to review by the courts, to fix shorter periods as "reasonable" ones according to particular fact situations. See Comment, 69 Yale L. J. 1393, 1424; 105 Cong. Rec. 18153 (remarks of Mr. Griffin). And as so construed, the constitutionality of this clause stands unimpaired. The standard of "reasonableness," employed daily by judges and administrators in countless rules of decision, is sufficient to shield authority granted an administrative agency from constitutional attack, just as is, for example, the standard of "the public interest," see *New York*

*Appendix A*

*Central Sec. Corp. v. United States*, 287 U. S. 12, 24; *McManus v. CAB*, 2 Cir., 286 F. 2d 414.

The Union contends that it was not afforded a reasonable period of time to invoke the expedited procedure of § 8(b)(7)(C). But under that section all the Union had to do was to file "a petition under section 9(c) * * * within a reasonable period of time not to exceed thirty days from the commencement of such picketing." We think the record amply supports the Board's finding that this was not done that by November 27 the Union had had reasonable opportunity to file a simple representation petition. The Union makes much of the Board's practice under its Regulations, 29 C. F. R. Sections 102.73-102.82, whereby the filing of a *bona fide* charge is a prerequisite to the expedited procedure envisaged by § 8(b)(7)(C). It apparently argues that the effect of the practice here was to cut down from 12 to 2 days the time within which it could "invoke the expedited procedure." But this argument loses sight of the fact that in every § 8(b)(7)(C) case, to validate the continuation of organizational picketing the Union must file "a petition under 9(c)". Whether thereupon the Board will invoked the expedited procedure is another matter. We base our decision, therefore, upon the holding that the statute does not give the Union a "right" to expedited procedure when it fails to file a representation petition.[2]

The Union attacks the Board's findings and conclusions with respect to the second proviso of § 8(b)(7)(C). This exempts from the operation of subsection (C) picketing

[2] For criticism of the practice, see Aaron, The Labor Management Reporting and Disclosure Act, 73 Harv. L. Rev. 1086, 1108-09. The practice was approved in *Reed v. Roumell*, D. C. E. D. Mich., 185 F. Supp. 4.

"for the purpose of truthfully advising the public" that the picketed shop is nonunion, but excepts from the exemption picketing which has the secondary effect of halting deliveries. Various interpretations of the exemption are possible. The Board did not make a finding as to whether this picketing was within the exemption's scope, because it thought that, in any event, the picketing had the proscribed secondary effect. We agree. The Union argues that the delivery-stoppage, if any, was caused by a notice sent to suppliers informing them of the picket line, not by the picket line itself. But whether such a hair-splitting distinction is meaningful we do not need to decide. For the Examiner found "the picketing" to be the cause of cessation and our study of the record reveals testimony to support that finding. The Union also predicates error on the fact that the Examiner recited post-complaint evidence of delivery cessation. But this is of no moment. There was substantial pre-complaint evidence sufficient to support the Examiner's crucial findings on this point. Moreover, § 10(b) gives the Board "power to issue * * * a complaint *stating the charges*," and we think that *N. L. R. B. v. Fant Milling Co.*, 360 U. S. 301, holding that the Board may utilize post-charge evidence, is equally applicable to post-complaint evidence.

Enforcement granted.

## Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Respondent.*

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No. 26600.

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### DECREE

Before: Hincks and Moore, Circuit Judges, and Brennan, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on June 1, 1960. The Court heard argument of respective counsel on February 24, 1961, and has considered the briefs and transcript of record filed in this cause. On April 17, 1961, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and

that Local 239, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, its officers, representatives and agents, abide by and perform the direction of the Board in said order contained.

C. C. HINCKS,
*Judge, United States Court of Appeals for the Second Circuit.*

LEONARD P. MOORE,
*Judge, United States Court of Appeals for the Second Circuit.*

FILED: May 4, 1961

A true copy,

A. Daniel Fusaro
Clerk

by Niall F. O'Doherty
Chief Deputy Clerk.

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| A. The Board's findings of fact | 3 |
| B. The Board's decision and order | 9 |
| C. The court of appeals decision | 11 |
| Argument | 11 |
| Conclusion | 17 |


## CITATIONS

Cases:


| | |
|---|---|
| *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532 | 16 |
| *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694 | 16 |
| *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206 | 11 |
| *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board (General Electric Co.)*, 366 U.S. 667 | 15 |
| *McLeod* v. *Local 239, Teamsters*, 179 F. Supp. 481 | 10 |
| *National Labor Relations Board* v. *Drivers Local No. 639 (Curtis Bros.)*, 362 U.S. 274 | 14 |
| *Teamsters* v. *Vogt*, 354 U.S. 284 | 16 |




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Statutes:

National Labor Relations Act, as amended (61 Stat. 136. 73 Stat. 541, 29 U.S.C. 151, *et seq.*:)

Page

Section 8(b)(7)..... 2, 3, 8, 9, 11, 12, 13, 14, 15, 16

Section 9(c)..... 4

Section 10(l)..... 10

28 U.S.C. 210(c)..... 11

Miscellaneous:

105 Cong. Rec. 14348; II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, p. 1523..... 14

105 Cong. Rec. 18153; II Leg. Hist. 1812..... 13

105 Cong. Rec. 19772; II Leg. Hist. 1858..... 12

# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 260

LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The decision of the court of appeals (Pet. 17–26) is reported at 289 F. 2d 41. The Board's decision and order (R. 8–54)[1] are reported at 127 N.L.R.B. 958.

### JURISDICTION

The decision of the court of appeals was issued on April 17, 1961, and a decree was entered on May 4, 1961 (Pet. 17, 27–28). The petition for cer-

[1] "R" refers to the Joint Appendix filed with the court below.

tiorari was filed on July 26, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, in determining whether certain picketing was in violation of Section 8(b)(7)(C) of the National Labor Relations Act because conducted for more than "a reasonable period of time" without a petition for a representation election having been filed, could properly take into account the length of time the union had been picketing prior to the effective date of Section 8(b)(7)(C).

2. Whether Section 8(b)(7) may properly be interpreted to encompass peaceful picketing for recognition or organizational purposes.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 541, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 8 * * *
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor or-

ganization is currently certified as the representative of such employees: * * *

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. * * *

## STATEMENT

### A. THE BOARD'S FINDINGS OF FACT

On September 14, 1939, Samuel Krieger, business agent of petitioner Local 239 (herein "the Union"), called on Allan Jay, president of Stan-Jay Auto Parts and Accessories Corporation (herein "the Company") (R. 22–23; 59–60). Krieger informed Jay that the Union was engaged in an organizational drive in the industry, that other jobbers had signed

up, and now his "turn had come" (R. 23; 92, 60–61). Krieger stated that the purpose of his visit was to have Jay sign a collective bargaining contract with the Union and that "they meant business" (R. 23–24; 60).[2] Jay stated that, if his employees expressed the desire to have the Union represent them, the Company would then consider a contract. Krieger replied that he did "business" directly with the employer and was "not worried about the men" (R. 23; 61). When Jay refused to "sign up" Krieger warned, "If you don't join up, we will throw a picket line up and you get no stuff, no deliveries, and you are out of business" (R. 24; 61). Krieger showed Jay the Union's standard contract and warned him that he "had better sign it" (R. 24; 62, 172–199).[3] Jay refused to sign. The Union left the contract with him, inscribing the following notation thereon: "These are the terms and conditions we hope to win for your employees" (R. 24; 62–64, 172).

On September 21, 1959, the Union began picketing the Company's premises (R. 11, 25; 56). The picketing was conducted every day, during business hours, until January 15, 1960 (R. 11, 29; 56, 88). About an hour after the picketing began, Krieger asked the

[2] The Company's employees have never been represented by any labor organization (R. 22; 59). Further, petitioner conceded that none of the employees ever joined the Union or designated it as bargaining representative. Petitioner also conceded that it has never filed a petition under Section 9(c) of the Act, seeking representation rights among the Company's employees (R. 22; 56–57).

[3] The contract included a provision recognizing the Union as "sole and exclusive bargaining agent for all employees" and contained a union shop clause (R. 24; 173).

Company's vice president and treasurer, Donald M. Marcote, when the Company was "going to join the Union" (R. 25; 96–98). Krieger stated that Marcote could force the employees into the Union and proposed a "deal." In exchange for the Company's agreement to "join now," the Union would require that only two of the existing employees become union members, but "if [it] waited and didn't join now, then everyone would have to belong to the Union" (R. 25; 98–99). Marcote rejected Krieger's proposal (*ibid.*).[4]

On November 20, 1959, a week after the provisions of Section 8(b)(7) of the Act (pp. 2–3, *supra*) became effective, and after the picketing had been in progress for two months, Krieger proposed the above "deal" to President Jay, making it clear that if Jay rejected the proposal the picketing would continue (R. 26; 71–72). Conversely, Krieger promised that if the "deal" were accepted the Union would withdraw its picket line and proceed instead against a nearby unorganized competitor of the Company (*ibid.*). When Jay pointed out that two employees had expressed their opposition to the Union,[5] Krieger reiterated that the minimal basis upon which the Union would be willing to terminate the picketing would be the Company's acceptance of a collective bargaining agree-

[4] That same day, one of the pickets warned Marcote that if he "had any money in the business [he] had better get it out fast because [he] would lose it" (R. 99).

[5] On November 20, 1959, the Company staff consisted of Jay, his partner Marcote, four regular employees, and a part-time bookkeeper (R. 89–90).

ment covering two of its existing employees, together with a union shop clause which would require employees hired in the future to join the Union after 30 days of employment (R. 26; 72–73). Jay rejected the Union's demand (R. 73).

Except at its early stages,[6] the picketing was orderly and peaceful (R. 11, 27; 64–66, 71, 101). The pickets carried placards, shouted derogatory slogans concerning the Company, directed customers to competitors' stores, and distributed leaflets urging the Company's employees to join the Union and urging the Company's customers to patronize establishments represented by the Union (R. 27; 66–68, 118, 201–204).[7] From the inception of the picketing until after November 24, 1959, the signs carried by the pickets read as follows (sometimes with the words "is stingy" added after "Stan-Jay") (R. 28–29; 57, 65, 68–69, 119–120, 207):

---

[6] The Company was forced to summon police assistance during the early weeks of the picketing because pickets blocked ingress to the Company's premises (R. 27; 64–65, 100).

[7] The first leaflet appeared on September 21, 1959, the first day of the picketing (R. 27; 67), and read in part (R. 201): "We appeal to Stan-Jay workers to place the interests of their families ahead of their employers by joining the ranks of the men and women in the organized parts industry. JOIN LOCAL 239! IMPROVE YOUR WORKING CONDITIONS! DEMAND UNION WAGES AND UNION WORKING CONDITIONS IN A UNION SHOP!" The leaflet closed with an appeal "to the public" to patronize "Local 239 shops" and included therein "a partial list of Local 239 shops in this area" (R. 201–203). During the course of the picketing, the Union distributed other leaflets (R. 27; 67–68, 204).

LOCAL 239, I.B. of T.

WANTS THE EMPLOYEES OF

STAN-JAY

452 LONG BEACH BOULEVARD, LONG BEACH
TO JOIN THEM TO GAIN UNION WAGES JOB
SECURITY AND WORKING CONDITIONS
AUTOMOTIVE PARTS AND SPECIALTY
PRODUCTS
DRIVERS, HELPERS, WAREHOUSEMEN,
TEAMSTERS
210-01 NORTHERN BOULEVARD, L.I.

Shortly after November 24, 1959, the following sign was substituted for the earlier placards (R. 28–29; 58, 70, 151):

TO THE
PUBLIC
PLEASE BE ADVISED
STAN-JAY
AUTO PARTS
DOES NOT
EMPLOY MEMBERS OF, NOR HAS ANY
CONTRACT WITH ANY LABOR UNION
INCLUDING LOCAL 239, I.B. of T.

Both before and after the "To The Public" signs were substituted, the Union continued its efforts to solicit membership among the Company's employees and to induce them to join the Union (R. 30; 116–117, 121–122, 145–146, 152–153). And, shortly before Christmas, Krieger informed employees Joe Morrison and

Ted O'Neill that the Union had set a record by picketing on Staten Island for 19 consecutive months and warned them that "he was prepared to set a new record with [Stan-Jay]" (R. 30; 121–123).[8]

When the picketing began, the Union notified the Company's suppliers that it was picketing the Company. So far as the record shows, that notice was never rescinded (R. 13, 30; 144). Accordingly, though the Company customarily received and dispatched substantial amounts of goods at its premises by means of trucks operated by outside carriers and suppliers, during the entire period of the picketing no deliveries and no pick-ups were made across the picket line (R. 13, 30; 74–75, 80, 90–91, 95–96, 107, 129, 156–158).[9] The record, moreover, is replete with specific instances where truck drivers employed by shippers and suppliers refused to make scheduled deliveries across the Union's picket line (R. 31–32; 113, 115, 124–129, 149, 153–155, 163–166, 167–168, 170–171). These specific refusals all occurred subsequent to November 13, 1959, the effective date of Section 8(b)(7), and most of them took place while the pickets were carrying the placards entitled "To The Public" (*ibid.*).

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[8] On January 14, 1960, Krieger told Morrison that if the employees could assure the Union that "around the beginning of summer" they would join the Union, then the pickets would "go around the corner" and give the Company's non-union competitor "a taste of the medicine we gave you" (R. 123–124).

[9] A few deliveries were made to the store at night, after the pickets had departed for the day (R. 30; 80, 90–91). These shipments, however, amounted to not more than ten percent of the total merchandise purchased while the picketing was in progress (R. 91).

### B. THE BOARD'S DECISION AND ORDER

On November 23, 1959, ten days after the new Section 8(b)(7) became effective, the Company filed an unfair labor practice charge with the Board's Regional Director, alleging that the Union's picketing violated subparagraph (C) of that Section (R. 2). Section 8(b)(7)(C) (pp. 2–3, *supra*) bans picketing for the purpose of "forcing or requiring" an employer to recognize, or his employees to accept or select, a labor organization as the collective bargaining representative, "where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. * * *" There are two provisos, the second of which reads:

> *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

On November 24, a copy of the charge was served, by registered mail, on the Union. On November 25, the Regional Director telegraphed the Union requesting that it advise him "immediately whether [the Union] intend[ed] to file a petition under Section 9(c)" (R. 58). The telegram further advised the

Union that, "unless such petition is filed by close of business Friday, November 27, 1959, this office contemplates issuance of a complaint herein and application for injunctive relief under Section 10(l) of the Act" (*ibid.*). When the Union failed to file a representation petition, the Regional Director, on November 30, 1959, issued the complaint which forms the basis of this proceeding (R. 3–6), and on December 2 filed a petition for injunctive relief under Section 10(l). The district court granted the petition, and on January 21, 1960, issued an order enjoining the Union's picketing pending final disposition of the unfair labor practice proceeding by the Board. *McLeod* v. *Local 239, Teamsters*, 179 F. Supp. 481, 488 (E.D. N.Y.).

On June 1, 1960, the Board issued its decision and order. Upon the facts set forth above, the Board found that "the objective of [the Union's] picketing both before and after the effective date of the new Act was the same—organization and recognition" (R. 15). The Board further found that, since the picketing "had been going on continuously for almost 2 months before the new Act became effective * * * the 17 days of additional picketing thereafter [was] a reasonable period of time [in] which to require the Respondent to file a representation petition" (R. 12). Finally, the Board found that the Union had not filed such a petition within that period, or indeed at any time during the course of the picketing, and that the picketing had continuously induced truck drivers employed by common carriers and outside suppliers "not to pick up" goods from or "deliver"

goods to the Company (R. 12–14). Accordingly, the Board concluded that the Union, by its picketing, had violated Section 8(b)(7)(C) of the Act. The Board's order required the Union to cease and desist from the unfair labor practice found and to post appropriate notices (R. 15–18).

### C. THE COURT OF APPEALS DECISION

The court of appeals sustained the Board's findings and conclusions and enforced its order in full (Pet. 17–26).

## ARGUMENT [10]

1. Petitioner does not seriously challenge (Pet. 10; but cf. Pet. 14–16) the finding of the Board, approved by the court below, that an object of its picketing, both before and after the enactment of Section 8(b)(7), was to organize the employees of the Company and to obtain recognition as their bargaining representative.[11] Its principal contention (Pet. 2, 9) is that the Board was in error in concluding that, in the circumstances of this case, the Union

[10] Preliminarily, it may be noted that, if the decision of the court of appeals be treated as containing the court's judgment (Pet. 17, 26), the petition for certiorari was not filed within the 90-day period specified in 28 U.S.C. 2101(c). The decision was issued on April 17, 1961, and the petition was not filed until July 26, 1961. Although a decree was entered on May 4, 1961 (Pet. 27–28), it did not revise legal rights or obligations, but was a ministerial formalization of the decision of April 17. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

[11] However, the facts summarized in the Statement furnish ample support for the Board's finding that the picketing had such objective, and that it had a substantial effect on deliveries to the Company.

had picketed for an unreasonable period of time without filing a representation petition when it did not file one within 17 days after Section 8(b)(7) became effective. This issue, which turns on the special facts of this case, is not of general importance and thus does not warrant review by this Court. The question of whether the Board may take into account the length of the picketing prior to the effective date of Section 8(b)(7), in determining how long the picketing may continue thereafter without a representation petition being filed, is relevant only to the small number of cases in which picketing had been in progress when the new provision took effect. And, with Section 8(b)(7) now almost two years old, it is probable that only a few of such cases are still "alive."

In any event, the Board correctly took into account the pre-Section 8(b)(7) picketing in assessing the reasonable period of time for filing a representation petition. The purpose of Section 8(b)(7)(C) is to afford a union a reasonable opportunity to use picketing as an organizational device; thereafter a Board election may fairly be held to determine whether a majority of the employees desire the union as their representative. The section sets 30 days as the maximum period for picketing without filing a representation petition, but empowers the Board to fix shorter periods as "reasonable" depending on the particular facts.[12] Since the picketing here had been going on for about 60 days prior

[12] Thus, Senator Goldwater stated (105 Cong. Rec. 19772; II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, p. 1858): "[Section 8(b)(7)(C)] simply means this: A union may not picket for recognition or for organiza-

to the effective date of Section 8(b)(7), the Union had already had twice the period provided by Section 8(b)(7)(C) to build up employee support through picketing. Hence, there was no need to give it an additional 30 days for this purpose after the new provision became effective; some lesser period could appropriately be fixed by the Board; and, under the circumstances, the 17 additional days which were afforded the Union could not be viewed as insufficient.

Nor is there merit to petitioner's contention (Pet. 9) that the phrase "reasonable period" in Section 8(b)(7)(C) is so vague as to violate due process requirements. As the court below answered (Pet. 24): "The standard of 'reasonableness,' employed daily by judges and administrators in countless rules of decision, is sufficient to shield authority granted an administrative agency from constitutional attack * * *."

2. Equally insubstantial is petitioner's further contention (Pet. 10–14) that the Board erred in inter-

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tional purposes for more than a reasonable period *which may be less than 30 days if the Board so determines*, but may not be longer, without a petition for a representation election being filed with the Board. If no such petition is filed in such period then at the end thereof, but not later than the 31st day from its commencement, such picketing, if continued or resumed, becomes an unfair labor practice." (Emphasis added.)

Similarly, Representative Griffin, co-sponsor of the provision and a member of the Conference Committee, stated in explaining the Conference bill to the House (105 Cong. Rec. 18153; II Leg. Hist. 1812): "Of course, the picketing may be enjoined in less than 30 days if the Board finds the circumstances are such as to make it unreasonable to permit it to continue and it must be stopped at the end of 30 days."

preting "forcing or requiring" in Section 8(b)(7) (p. 2, *supra*) as encompassing peaceful picketing for recognition or organizational purposes. The legislative history makes it plain that Congress did not intend to restrict that provision to situations where picketing was accompanied by force and violence.[11] Moreover, as the court below observed (Pet. 22), the language of the provision is not inconsistent with this purpose for it is "clear that 'forcing or requiring' refers to the intended effect of the picketing, not the manner in which the picketing is carried on, to the 'object', not the method * * *."

The conclusion that Section 8(b)(7) encompasses peaceful picketing for recognition or organizational purposes is not in conflict with the decisions of this Court in *National Labor Relations Board* v. *Drivers*

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[11] As Representative Griffin stated, in explaining Subsection 705(c) of the Landrum-Griffin bill, the precursor to Section 8(b)(7) (105 Cong. Rec. 14348; II Leg. Hist. 1523): "[This provision] embodies a major reform. It is intended to prohibit blackmail recognition picketing by unions which do not represent the employees. * * * The customary method employed to force employers [to sign bargaining contracts irrespective of the contrary wishes of the employees] is to place picket lines around their plant or shops. Such picketing *even when peaceful*, will frequently cause small employers to capitulate. The picket line is a signal for truckers not to pick up or deliver goods to employees of maintenance contractors. Pickets also deter many customers from entering retail or service establishments. In the face of such tactics employees whose jobs are in jeopardy as they see their employer's business choked off are soon coerced into joining the picketing union—even though they might prefer another union. In many such cases their employer forces them in a particular union by signing a compulsory membership agreement with the picketing union." (Emphasis added.)

*Local No. 639 (Curtis Bros.)*, 362 U.S. 274, and *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board (General Electric Co.)*, 366 U.S. 667 (Pet. 9, 11–12). In *Curtis*, the Court merely held that Congress did not intend to reach peaceful picketing for recognitional purposes in Section 8(b)(1)(A) of the Taft-Hartley Act, for that provision was only aimed at "union tactics involving violence, intimidation, and reprisal or threats thereof" (362 U.S. at 290). The Court did not decide that such picketing was not encompassed in Section 8(b)(7), which had not even been enacted when the picketing of Curtis occurred. Indeed the Court specifically noted (362 U.S. at 291) that, by enacting the recent Section 8(b)(7)(C), Congress had gone beyond the Taft-Hartley Act and legislated "a comprehensive code governing organizational strikes and picketing," which "draws no distinction between 'organizational' and 'recognitional' picketing" and proscribes "*peaceful organizational strikes* in many situations * * *." (Emphasis added.) Similarly, *Local 761* merely involved the question of whether certain picketing was within the scope of Section 8(b)(4)(A), the secondary boycott provision of the Act; no question was presented in that case as to application or scope of Section 8(b)(7).

Finally, to hold that the picketing in this case was violative of Section 8(b)(7)(C) presents no substantial constitutional question (Pet. 13–14). The Board and the court below found that the picketing was conducted for the purpose of forcing the employer to recognize, and the employees to select, the union as the collective bargaining representative, and that it

caused a complete cessation of normal deliveries and shipments to the employer's business. The legislature clearly has power to regulate picketing of this type, in these circumstances. See *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532; *Teamsters* v. *Vogt*, 354 U.S. 284; cf. *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705.

3. The question as to whether Section 8(b)(7) reaches picketing which is conducted solely for the purpose of protecting union standards (Pet. 14–16) is not presented on this record. As shown, the Board and the court below found, and the evidence summarized in the Statement amply supports the finding, that the Union's object, at all times, was to force the employer to recognize, and the employees to select, it as the bargaining agent. Indeed, petitioner appears to concede the validity of this finding for the purposes of most of its petition (see Pet. 10).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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